NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TERRANCE FOWLER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1787 WDA 2011

Appeal from the Sentencing of September 20, 2011
In the Court of Common Pleas of Erie County
Criminal Division at No.: CP-25-CR-0002536-2010

BEFORE: FORD ELLIOTT, P.J.E., MUSMANNO, and PLATT*, JJ.

MEMORANDUM BY PLATT, J.: FILED: June 1, 2012

Appellant, Terrance Fowler, appeals from the judgment of sentence entered following his jury conviction of attempted homicide[1], aggravated assault[2], conspiracy to commit robbery[3], and possessing instruments of crime[4]. Counsel for Appellant has petitioned to withdraw on the ground that Appellant's issues on appeal are wholly frivolous. We grant the petition to withdraw and affirm the judgment of sentence.

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 901(a), 2502(a).

[2] 18 Pa.C.S.A. § 2702(a)(1).

[3] 18 Pa.C.S.A. § 3701(a)(1)(i).

[4] 18 Pa.C.S.A. § 907(a).

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At the trial of this matter, Aleksandr Cheremnykh (victim) testified that he owns the jewelry store where he was working on July 7, 2010, when he observed Appellant and his accomplice enter the store. (***See*** N.T., 7/14/11, at 24, 26). Appellant pointed a semiautomatic handgun at him and ordered him to open the safe. (***See id.*** at 26-28). After victim refused to open the safe, Appellant shot him in the middle of the chest. (***See id.*** at 30-31). Appellant and his accomplice took several old currency silver certificates and keys on a large key ring. (***See id.*** at 34, 46).

The Commonwealth also called Bruce Wagner, a resident who lived less than a quarter mile from the jewelry store, to testify on behalf of the prosecution. (***See id.*** at 50, 52). Wagner observed Appellant and his accomplice sitting in a parked vehicle for a few minutes before getting out of the car and walking in the direction of the jewelry store. (***See id.*** at 54). When the men walked away, he "ran out and wrote down the license plate number of the car." (***Id.*** at 59). Approximately ten minutes later, he observed the men come back, drive away, and return moments later. (***See id.*** at 55-56). Upon returning, the men got out of the vehicle, walked in the direction of the store, and, less than fifteen minutes later, they came running back. (***See id.*** at 58).

Erie Police Officer Salvador Velez testified that, when he responded to the robbery, Wagner flagged him down, gave him the information including the license plate number, and described the car and its occupants. (***See id.***

at 94-96). Velez then found a five-dollar silver certificate in the car. (***See id.*** at 96).

Appellant's father, James Fowler, testified that Appellant was out of the home they shared for "not quite an hour" earlier that morning. (***Id.***, 7/15/11, at 40; ***see also id.*** at 34). Another witness testified that Appellant is a "peaceful, quiet and loving, good family guy." (***Id.*** at 63).

The jury convicted Appellant of the aforementioned crimes on July 17, 2011. On September 13, 2011, Appellant filed a post-trial motion challenging the weight and sufficiency of the evidence to support a conviction, which the trial court denied. On September 20, 2011, the court sentenced Appellant to an aggregate term of incarceration of no less than twenty-seven and one-half nor more than fifty-five years, merging the aggravated assault count into the attempted murder conviction. (***See*** Sentencing Order, 9/20/11, at 1). On September 28, 2011, Appellant filed a post-sentence motion seeking a reduction of sentence and arguing that the court failed to consider mitigating factors. The court denied Appellant's motion on October 10, 2011. Appellant timely appealed.[5]

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[5] Appellant filed a Rule 1925(b) statement on December 6, 2011. The court filed a Rule 1925(a) opinion on December 9, 2011.

On February 27, 2012, counsel filed an ***Anders***[6] brief raising two issues that might arguably support an appeal. On March 23, 2012, counsel filed a petition for leave to withdraw stating that after a conscientious examination of the record, she found the appeal to be wholly frivolous. (***See*** Petition for Leave to Withdraw as Counsel, 3/23/12, at unnumbered page 1). Attached to the petition is a copy of her letter to Appellant advising him of counsel's desire to withdraw as counsel and Appellant's right to retain new counsel or proceed with his appeal *pro se*, and providing him with a copy of the brief filed with this Court. (***See id.*** at Appendix I). On March 27, 2012, this Court denied Appellant's *pro se* motion to withdraw the ***Anders*** brief, and granted his request for an extension of time to file a *pro se* brief. (***See*** *Per Curiam* Order, 3/27/12, at 1). Appellant filed a brief on March 29, 2012.[7] (***See*** Appellant's Brief in Opposition to Appellate Counsel's Petition for Leave to Withdraw, 3/29/11). On April 12, 2012, this Court denied Appellant's request to proceed *pro se*. (***See*** *Per Curiam* Order, 4/12/12, at 1). On April 27, 2012, this Court again granted Appellant an extension of time to file a *pro se* brief. (***See*** *Per Curiam* Order, 4/27/12). Appellant filed a *pro se* brief on April 30, 2012. (***See*** Appellant's *Pro Se* Brief in Support of Appellate Review, 4/30/11).

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[6] ***See Anders v. California***, 386 U.S. 738 (1967); ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), *abrogated in part by* ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009).

[7] Appellant also filed a *pro se* Brief on Appeal for Relator/Appellant by "Special Appearance." However, not only does the 192-page brief violate this Court's page number limit and contain issues not raised in the trial court, this Court's April 27, 2012 Order granted Appellant's Application For Extension of Time to File Brief, in which Appellant requested the extension "to complete a *pro se* brief in addition to counsel's brief." (Appellant's Application for Extension of Time to File Brief, 4/24/12, at unnumbered page 1, ¶ 1; ***see*** *Per Curiam* Order, 4/27/12). Appellant did not request, nor would we have granted, the opportunity to file multiple *pro se* briefs in addition to the ***Anders*** brief. (***See*** Appellant's Application for Extension of Time to File Brief, 4/24/12, at unnumbered pages 1-2). Therefore, for all of *(Footnote Continued Next Page)*

> [I]n the ***Anders*** brief that accompanies . . . counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Santiago, ***supra*** at 361.

> ***Anders*** counsel must also provide a copy of the ***Anders*** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention.
>
> If counsel does not fulfill the aforesaid technical requirements of ***Anders***, this Court will deny the petition to withdraw and remand the case with appropriate instructions (*e.g.*, directing counsel either to comply with ***Anders*** or file an

(Footnote Continued) ———————————

these reasons, we decline to consider the merits of the issues raised in the Brief on Appeal for Relator/Appellant by "Special Appearance" and quash them. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); Pa.R.A.P. Pa.R.A.P. 2101(a) (briefs that do not materially conform to the Rules of Appellate Procedure may be quashed); 2135(a)(1) (providing that briefs are limited to seventy pages).

> advocate's brief on Appellant's behalf). By contrast, if counsel's petition and brief satisfy ***Anders***, we will then undertake our own review of the appeal to determine if it is wholly frivolous. If the appeal is frivolous, we will grant the withdrawal petition and affirm the judgment of sentence. However, if there are non-frivolous issues, we will deny the petition and remand for the filing of an advocate's brief.

Commonwealth v. O'Malley, 957 A.2d 1265, 1266 (Pa. Super. 2008) (citations omitted).

In the instant case, counsel has complied with the ***Anders*** and ***Santiago*** requirements. She has submitted a brief that summarizes the case and cites to the record, (***see Anders*** Brief, at 7-11); referred to anything that might arguably support the appeal, (***see id.*** at 15-17); and set forth her reasoning and conclusion that the appeal is frivolous, (***id*** at 17-19, 22-24). ***See Santiago***, ***supra*** at 361. She has filed a petition to withdraw, sent Appellant a letter advising him that she found no non-frivolous issues, provided Appellant with a copy of the ***Anders*** brief, and notified him of his right to retain new counsel or proceed *pro se*.

"Once counsel has satisfied the [***Anders***] requirements, it is then this Court's duty to conduct its own review of the trial court's proceedings and render an independent judgment as to whether the appeal is, in fact, wholly frivolous." ***Commonwealth v. Lilley***, 978 A.2d 995, 998 (Pa. Super. 2009) (citation omitted). Because "***Anders*** specifically contemplates that, after counsel files the ***Anders*** brief, an appellant may file a *pro se* brief[;] when conducting an ***Anders*** review, this Court will consider not only the brief filed by counsel but also any *pro se* appellate brief." ***Commonwealth v. Nischan***, 928 A.2d 349, 353 (Pa. Super. 2007), *appeal denied*, 936 A.2d 40 (Pa. 2007).

Here, the ***Anders*** brief raises two questions for our review:

> [I.] Whether the convictions were against the weight of the evidence because the victim did not identify Appellant, the eyewitness identification of the alleged co-conspirator was flawed and tainted by seeing Appellant at prior proceedings, no tangible evidence linked Appellant to the robbery, Appellant's father testified that Appellant was home when the robbery occurred and a character witness testified to Appellant's reputation for non-violence?
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> [II.] Whether the sentence of 240 to 480 months for [a]ttempted [h]omicide should have been modified because it is a statutory limit, the minimum sentence is indistinguishable from an aggravated range sentence, and the sentence for [a]ttempted [h]omicide should have merged into the sentence for [a]ggravated [a]ssault instead of the opposite?

(***Anders*** Brief, at 5).

Before we turn to the issues raised in Appellant's *pro se* brief, we remind him that, as this Court has previously stated:

> although this Court is willing to construe liberally materials filed by a *pro se* litigant, *pro se* status generally confers no special benefit upon an appellant. Accordingly, a *pro se* litigant must comply with the procedural rules set forth in the Pennsylvania Rules of the Court. This Court may quash or dismiss an appeal if an appellant fails to conform with the requirements set forth in the Pennsylvania Rules of Appellate Procedure. Pa.R.A.P. 2101. For example,
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> > The argument [section] shall be divided into as many parts as there are questions to be argued; and shall have as the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.
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> Pa.R.A.P. 2119.

Commonwealth v. Lyons, 833 A.2d 245, 251-52 (Pa. Super. 2003), *appeal denied*, 879 A.2d 782 (Pa. 2005) (citations omitted).

Here, as in ***Lyons***, "the defects in Appellant's brief are substantial." ***Id.*** at 252. Appellant fails to set forth a statement of questions involved and his fifty page brief is "rambling, repetitive and often incoherent." ***Id.*** "We shall not develop an argument for [Appellant], nor shall we scour the record to find evidence to support an argument[.]" ***Commonwealth v. Beshore***, 916 A.2d 1128, 1140 (Pa. Super. 2007), *appeal denied*, 982 A.2d 509 (Pa. 2009). However, "in the interest of justice we address the arguments that can reasonably be discerned from this defective brief." ***Lyons, supra*** at 252.

It appears that, in his *pro se* brief, Appellant attempts to address the claims raised in the ***Anders*** brief, as well as challenge the sufficiency of the evidence to establish that he was the perpetrator of the crimes, and raise two additional questions in which he alleges the admission of hearsay testimony and the related allegation of the court's failure to instruct the jury on the use of impeachment evidence. (***See*** Appellant's *Pro Se* Brief in Support of Appeal *passim*). We agree with counsel that Appellant's issues are frivolous.

We will review the weight, sufficiency, and sentencing issues first because they are raised by both briefs to some extent, and then consider the remaining discernible questions in Appellant's *pro se* brief. First, Appellant challenges the sufficiency and weight of the evidence to establish that he was the perpetrator of the crimes where the eyewitness testimony was inconsistent, there was no physical evidence linking him to the crimes, and the Commonwealth failed to establish *corpus delecti* and specific intent. (***See*** Appellant's *Pro Se* Brief, at 3-12, 14, 38; ***see also Anders*** Brief, at 17). We agree with counsel that these issues are frivolous and lack merit.

> In reviewing whether the evidence was sufficient to support a jury's findings . . . this Court considers whether the evidence, viewed in the light most favorable to the Commonwealth, is sufficient to enable a reasonable jury to find every element of the crime beyond a reasonable doubt. In applying this standard, we bear in mind that: the Commonwealth may sustain its burden by means of wholly circumstantial evidence; the entire trial record should be evaluated and all evidence received considered, whether or not the trial court's rulings thereon were correct; and the trier of fact, while passing upon the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence.

Commonwealth v. Cousar, 928 A.2d 1025, 1032 (Pa. 2007), *cert. denied*, 553 U.S. 1035 (2008) (citations omitted).

> An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. The Pennsylvania Supreme Court has explained that [a]ppellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. To grant a new trial on the basis that the verdict is against the weight of the evidence, this Court has explained that the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court.
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> [This Court shall not undertake to reassess credibility of witnesses, as] it is well settled that we cannot substitute our judgment for that of the trier of fact. Further, the finder of fact was free to believe the Commonwealth's witnesses and to disbelieve the witness for the Appellant.

Commonwealth v. Chine, ____ A.3d ____, 2012 WL 432380, *1, *4-5 (Pa. Super. February 13, 2012) (citations and quotation marks omitted).

Here, the trial court found that:

> [T]he verdict was not against the weight of the credible evidence in that the jury found the Commonwealth's witness who identified [Appellant], his vehicle, and license plate number in close proximity to the crime scene before, during, and after. That, along with the descriptions of the assailant, the videotape of the robbers leaving the store, and the victim's description of his shooter constituted more than enough circumstantial evidence to implicate and convict [Appellant] beyond a reasonable doubt.

(Trial Court Memorandum Opinion, 12/09/11, at 1 (citation omitted)). The verdict does not shock the conscience of this Court. We conclude that the trial court properly exercised its discretion.

We next turn to Appellant's sufficiency of the evidence challenge. To establish the crime of attempted homicide, the Commonwealth must prove that the defendant took a substantial step toward an intentional killing. ***See*** 18 Pa.C.S.A. §§ 901(a), 2502(a). A conviction of aggravated assault requires that the Commonwealth establish that a defendant intentionally, knowingly, or recklessly inflicted serious bodily injury upon another, "manifesting extreme indifference to the value of human life." ***Id.*** at 2702(a)(1). "[I]f a deadly force is knowingly applied by the defendant to another, the specific intent to kill is as evident as if the defendant stated the intent to kill at the time the force was applied." ***Commonwealth v. Shank***, 883 A.2d 658, 664 (Pa. Super. 2005), *appeal denied*, 953 A.2d 538 (Pa. 2006).

Upon review, we find the evidence adduced at trial sufficient to sustain the jury's verdict. The Commonwealth produced testimony from both the victim and a witness who identified Appellant, as well as his vehicle, license plate, and accomplice both at, and in close proximity to, the crime scene, immediately prior to, during, and after the commission of the crimes. (***See*** N.T., 7/14/11, at 26-27, 54,-56, 58-60, 129). The victim testified that Appellant pointed a semi-automatic handgun at him, ordered him to open the safe, and then shot him in the center of his chest. (***See id.*** at 28-31). The jury believed the eyewitness accounts of the victim and the Commonwealth's witness and disbelieved that of Appellant's witnesses and we are not authorized to substitute our credibility determination for that of the jury. ***See Cousar, supra*** at 1033. Accordingly, we conclude that the evidence supported the verdict and the court did not abuse its discretion in denying Appellant's weight of the evidence claim and his challenges to the sufficiency and weight of the evidence are frivolous.[8] ***See id.*** at 1033; ***Chine, supra*** at *5; ***Shank, supra*** at 664.

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[8] We note that Appellant's argument that the evidence was insufficient because there was no physical evidence linking him to the crime also is frivolous. (***See*** Appellant's *Pro Se* Brief, at 29; ***Anders*** Brief, at 17); ***see also Cousar, supra*** at 1032.

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In the next issue, Appellant challenges the discretionary aspects of his sentence. (***See Anders*** Brief, at 20; Appellant's *Pro Se* Brief, at 38-39). Specifically, Appellant argues that his sentence for attempted homicide should have been modified because it is the statutory maximum, the minimum sentence is in the aggravated range, and the court should have considered mitigating factors. (***See Anders*** Brief, at 20; Appellant's *Pro Se* Brief, at 38-39).

It is well-settled that, where an appellant challenges the discretionary aspects of his sentence:

> . . . pursuant to the dictates of 42 Pa.C.S.A. § 9781, [Appellant] must petition for allowance of appeal by including in [her] brief a separate, concise statement of the reasons relied upon for allowance of appeal. ***See*** Pa.R.A.P. 2119(f). The Rule 2119(f) Statement must "raise a substantial question as to the appropriateness of the sentence" by demonstrating that the "actions of the sentencing court [were either] inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process."

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Also, Appellant's reliance on the *corpus delicti* rule is misplaced. This rule provides that "an extra-judicial admission or confession of one accused of crime cannot be received in evidence unless and until the corpus delicti of the crime has first been established by independent proof. Corpus delicti means the body of the crime or the fact that a crime has been committed." ***Commonwealth v. Meder***, 611 A.2d 213, 215 (Pa. Super. 1992), *appeal denied*, 622 A.2d 1375 (Pa. 1993) (citations omitted). Here, the statements offered into evidence were of eyewitnesses, not Appellant, and there was no question that a crime was committed. Accordingly, this argument is frivolous.

Commonwealth v. Fowler, 893 A.2d 758, 766 (Pa. Super. 2006) (case citations omitted).

In the instant case, the ***Anders*** brief includes a statement of reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). (***See Anders*** Brief, at 13-14). Therein, Appellant challenges the length of the sentences imposed, claiming that the court failed to consider mitigating factors, and "violated 42 Pa.C.S.A. § 9721[,[9]] which sets forth the considerations that should be made prior to fashioning a sentence[.]" (***Id.*** at 14; ***see also id.*** at 13).[10]

Section 9781 of the Sentencing Code provides, as follows:

> **(c) Determination on appeal.**—The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:
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> (1) the sentencing court purported to sentence within the guidelines but applied the guidelines erroneously;

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[9] Section 9721 provides, in relevant part, that: "the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S.A. § 9721(b).

[10] Appellant failed to include a Rule 2119(f) statement in his *pro se* brief. However, from what we can discern, Appellant raises the same argument as that set forth in the ***Anders*** brief. (***See Anders*** Brief, at 20; Appellant's *Pro Se* Brief, at 38-39). Therefore, we can review this issue based solely on the ***Anders*** brief and the record. Moreover, we note that the Commonwealth did not object to Appellant's omission and, therefore, we could have ignored it and determined whether the brief raised a substantial question. ***See Commonwealth v. Kiesel***, 854 A.2d 530, 533 (Pa. Super. 2004).

> (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
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> (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.
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> In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa.C.S.A. § 9781(c). "A substantial question will be found where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Code or is contrary to the fundamental norms underlying the sentencing process." ***Commonwealth v. Ventura***, 975 A.2d 1128, 1133 (Pa. Super. 2009), *appeal denied*, 987 A.2d 161 (Pa. 2009) (citation omitted). However, an allegation that a sentencing court failed to consider certain mitigating factors does not raise a substantial question. ***See Commonwealth v. Brown***, 741 A.2d 726, 735 (Pa. Super. 1999), *appeal denied*, 790 A.2d 1013 (Pa. 2001). Therefore, although Appellant's claim that the court failed to consider mitigating factors does not present a substantial question, his allegation that the court violated Section 9721(a) of the Sentencing Code does. Accordingly, we proceed to consider the merit of this claim.

The record reflects that, before imposing sentence, the court considered a pre-sentence investigation report (PSI) and Appellant's "age, his background, his character, and rehabilitative needs, the nature, circumstances, and seriousness of the offense and the protection of the community," and then provided a detailed explanation about why the twenty-to-forty year sentence for aggravated assault was appropriate. (***See*** Sentencing, 9/20/11, at 17-20). Accordingly, we conclude that the Appellant's challenge to the discretionary aspects of his sentence based on his argument that the court violated 42 Pa.C.S.A. § 9721 does not merit relief. ***See*** 42 Pa.C.S.A. § 9781(c); ***Commonwealth v. Moury***, 992 A.2d 162, 171 (Pa. Super. 2010) ("Where the sentencing court had the benefit of a [PSI], we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.") (citation and internal quotation marks omitted).

Appellant also challenges the legality of his sentence, arguing that the sentence for attempted murder should have merged into the one imposed for the aggravated assault conviction. (***See Anders*** Brief, at 21; ***see also*** Appellant's *Pro Se* Brief, at 34). We agree with counsel that this issue is frivolous.

> Sentences are appropriate for merger when the same facts support convictions for more than one offense, the elements of the lesser offense are included within the elements of the greater offense, and the greater offense includes at least one additional element. However, where both offenses require proof of at least one element that is different, the sentences do not merge.

Commonwealth v. Parham, 969 A.2d 629, 633 (Pa. Super. 2009), *appeal denied*, 989 A.2d 916 (Pa. 2010). "It is clear that the offense of aggravated assault is necessarily included within the offense of attempted murder; every element of aggravated assault is subsumed in the elements of attempted murder. [T]he two offenses merge for the purposes of sentencing." ***Commonwealth v. Anderson***, 650 A.2d 20, 24 (Pa. 1994).

Here, consistent with ***Anderson***, the court properly merged Appellant's sentence for aggravated assault into that for attempted homicide.[11] (***See*** N.T. Sentencing, 9/20/11, at 17-21). Accordingly, we conclude that the court did not fashion a manifestly unreasonable sentence and that counsel correctly found that Appellant's second issue is frivolous and does not merit relief. ***See Anderson***, ***supra*** at 24.[12]

Next, we turn to the discernible questions raised in Appellant's *pro se* brief wherein he challenges the court's alleged admission of hearsay evidence and the related claim that the court failed to provide the jury with an instruction on impeachment evidence. (***See*** Appellant's *Pro Se* Brief, at 15, 17). Appellant's challenges are waived for his failure to preserve the issues in the trial court. ***See*** Pa.R.A.P. 302(a). Moreover, they are frivolous and would not merit relief.

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[11] In his *pro se* brief, Appellant "argues[] that he should not have been sentenced separately for his conviction(s) for[]" robbery, criminal conspiracy, and possession of an instrument of crime. (Appellant's *Pro Se* Brief in Support of Appellate Review, at 43). Because Appellant failed to raise this argument with the trial court or in his Rule 1925(b) statement, this issue is waived. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Moreover, the argument is frivolous and would not merit relief, because neither robbery, criminal conspiracy, nor possession of an instrument of crime are lesser included offenses of attempted homicide. ***See Parham***, ***supra*** at 629; ***Anderson***, ***supra*** at 24.

[12] Appellant also argues in his *pro se* brief that the crimes of robbery, criminal conspiracy, and possession of an instrument of crime should have merged into the sentence for attempted murder. (***See*** Appellant's *Pro Se* Brief, at 38, 43). However, this issue is frivolous because these crimes have different elements that are not subsumed by attempted homicide.

In his hearsay challenge, Appellant appears to claim that the court improperly admitted Wagner's identification of Appellant and his accomplice because the statements were hearsay. (***See*** Appellant's *Pro Se* Brief, at 15). Specifically, Appellant seems to argue that, because Wagner previously had misidentified the accomplice, none of Wagner's testimony should have been admitted into evidence. (***See id.***). "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Accordingly, we conclude that Appellant's argument that Wagner's testimony was impermissible hearsay is frivolous and would not merit relief. Additionally, Appellant's related argument that the court erred in failing to instruct the jury that Wagner's testimony could only be considered for impeachment, rather than for its substantive merits, is patently frivolous.

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered:

Eleanor R. Valecko

Deputy Prothonotary

DATE: June 1, 2012